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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1141

STRICKLAND TRANSPORTATION COMPANY, INC.,
Appellant,

—v.—

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ARKANSAS-BEST FREIGHT SYSTEM, INC., GORDONS TRANSPORTS, INC., BRASWELL MOTOR FREIGHT LINES, INC., RED BALL MOTOR FREIGHT, INC., HERRIN TRANSPORTATION CO., and CONSOLIDATED COPPERSTATE LINES,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR APPELLANT IN OPPOSITION TO MOTIONS TO AFFIRM

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I. The Shreveport-New Orleans Rights

As the Government points out (Motion, p. 6), the central issue on which the Commission denied the purchase application with respect to the Shreveport rights was because those rights were "constructively dormant" since "England had exercised these rights almost exclusively for the 'interchange' arrangement with Strickland, which it [the Commission] found to have been, in effect, an unlawful assump-

tion of the rights by Strickland." [1] Thus, the central issue on which the Commission's order in this respect must stand or fall is whether the Strickland-England interchange was properly found to be unlawful. (Contrary to the contentions of some of the private appellees (see Herrin Motion, pp. 8-9), it is *not* Strickland's position on this appeal that the interchange might have been unlawful but that the unlawfulness should be excused.)—However, we note that there are certain other manifest errors of the Commission, on which its decision may well have turned, which the Government makes no effort to defend. In this category are the Commission's error in assuming that Strickland had admitted that the interchange arrangements were "novel" (J.S. p. 17 n. 13, 24), and the Commission's apparent partial reliance on its two prior decisions involving Strickland, rendered in 1958 and 1962, in determining what action to take with respect to the instant application. (See note 1, *supra*)

1. The Government's discussion (Motion, pp. 6-7) of the aspects in which the interchange is said to have been unlawful has been largely anticipated and dealt with in detail in our Jurisdictional Statement, pp. 27-34. In this category we put such red herrings as the question of the ownership of the trailers;[2] the basis of compensation and

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[1] The Government cannot resist the temptation to refer (Motion, p. 5) to two prior Commission decisions adverse to Strickland rendered in 1958 and 1962. For a fuller treatment of these decisions and their lack of adverse implication to the present case, see J.S. pp. 6-8, and n. 4. Certain of the private appellees also rehash these earlier decisions. (Arkansas-Best *et al.*, Motion, pp. 19-20.)

[2] As we pointed out in the Jurisdictional Statement (pp. 30-31) in promulgating the interchange rules in 1951 the Commission expressly rejected a suggestion that an "ownership" requirement be imposed upon equipment used. Indeed, in *Deaton Truck Lines,*

the claim of violation of 49 C.F.R. § 1057.5(c);[3] the fact that the shipments moved on Strickland's bills;[4] the alleged freedom from damage claims on England's part;[5] and the use of loaded and sealed trailers.[6] All these incidents are

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Inc.—Purchase—Lavendar, 97 M.C.C. 256 (1964), *aff'd sub nom. Alabama Highway Express, Inc.* v. *United States*, 241 F. Supp. 290 (N.D. Ala. 1965), *aff'd*, 382 U.S. 106 (1965), the Commission sanctioned an interchange where *all* the trailers belonged to one party.

[3] See our discussion of this point in the Jurisdictional Statement, pp. 27-31. The interchange approved in the *Deaton* case involved identical intercarrier financial arrangements. *Deaton* Tr., pp. 38-39. See also Booth, *Motor Carrier Leasing Regulations of the Interstate Commerce Commission* (1964 ed.), p. 42, which makes it clear that interchange agreements may provide that the consideration for the use of equipment is the surrender of other equipment.

[4] This practice is required by the Commission's own rules. See 49 C.F.R. § 1057.5(c); J.S., p. 49a. The standard handbook on the interchange rules admonishes the industry to employ this practice. Booth, *Motor Carrier Leasing Regulations of the Interstate Commerce Commission* (1964 ed.), p. 42. The cases reveal this to be the industry practice, to which the Commission takes no exception. See *Deaton Truck Lines, Inc.—Purchase—Lavendar, supra; Consolidated Copperstate Lines—Purchase—Sunset Motor Lines*, 85 M.C.C. 113 (1960). The Commission, as we pointed out in our Jurisdictional Statement (pp. 31-32), simply erred in its assertion that it was a frequent occurrence for England's participation as an interchange partner not to be noted on the bills.

[5] Unable to answer Strickland's point that the Commission itself has approved identical indemnification arrangements and that the arrangement accorded with the practicalities of the matter (J.S., at p. 33), the Government lamely suggests that a brief colloquy in the record here establishes a contrary "general rule" in the industry. (Motion, p. 6.) Not only is this grossly inadequate evidence of industry practice, but the Government fails to explain how departure from industry practice—if it were so—can be equated with unlawfulness.

[6] Of course, there is nothing in the Commission's regulations requiring the contents of trailers to be unloaded from them and shuffled around at interchange points. That such a "feather-bedding" practice is essential to a valid interchange has never before been suggested. Clearly if it is in the public interest for motor carriers to interline and interchange freight "without unloading"—and the Commission has said it is (see p. 6, *infra*)—this

perfectly consistent with a lawful interchange, and indeed many of them, as we pointed out, have been expressly approved by the Commission and appear to be necessary incidents of an efficiently run interchange.—While the Commission may change its rules regarding motor carrier interchange, and has frequently done so in formal proceedings for amendments to the leasing and interchange rules (see, *e.g.*, the further proceedings in *Ex parte No. MC-43, Lease and Interchange of Motor Vehicles,* reported at 52 M.C.C. 675, 64 M.C.C. 361, 68 M.C.C. 553, 79 M.C.C. 65, 79 M.C.C. 251, and 84 M.C.C. 247), the Commission did not purport to amend its interchange rules here; it purported only to be applying them.[7] Those rules are as binding on the agency as on the citizen. See, *e.g.*, *Service* v. *Dulles,* 354 U.S. 363 (1957).

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should be accomplished with as much expedition as possible, and the use of loaded and sealed trailers is certainly conducive to this. See also *Gilbertville Trucking Co.* v. *United States,* 371 U.S. 115, 121 n. 2 (1964), noting the advantages of interchanging loaded trailers. We would point out that this practice was involved in the interchanges involved in *Consolidated Copperstate Lines—Purchase—Sunset Motor Lines, supra,* and *Deaton Truck Lines, Inc.—Purchase—Lavendar, supra,* and was not challenged by the Commission in either case.

[7] The Commission's approval of the transfer application in *Deaton Truck Lines, Inc.—Purchase—Lavendar, supra,* furnishes an interesting contrast to its action in the case at bar. In that case Deaton, a long-haul carrier, had twice before attempted to bridge a small gap in its operating rights between certain southern cities and Memphis. Each time the Commission rebuffed the attempts. After Deaton acquired an option to purchase certain of Lavendar's rights, the two carriers entered into an interchange agreement under which Lavendar's two drivers and tractors were to transport Deaton's fully-loaded trailers over a short segment between Nesbitt and Memphis. Lavendar was paid a flat fee of $20 per movement, later reduced to $17.50. Deaton collected all revenues from shippers. No attempt to show public convenience and necessity was made; the entire reliance, in the transfer application filed by the parties, was on the interchange arrangement as showing lawful use of the rights. Various competing carriers;

The only new specific suggestions by the Government as to why the interchange might be deemed unlawful are without substance; moreover, they were not mentioned in the Commission's report, and, accordingly, could not be a basis for affirming that report in any event. See, *e.g.*, *Baltimore & O. R. Co.* v. *Aberdeen & R. R. Co.*, 393 U.S. 87, 91-92 (1968). For what they are worth, these new suggestions of illegality are:

(a) The suggestion that the interchange was unlawful because, in the example of a southbound movement, after the freight was interchanged between Strickland and England at Shreveport, it was reinterchanged by England to Strickland at New Orleans for local delivery. It is undisputed that Strickland had unlimited rights, including local delivery rights, in New Orleans. This practice, which is also complained of by appellees Arkansas-Best *et al.* (Motion, pp. 17-18), is clearly no more than the exercise of the power of an originating carrier, absent contrary shipper directions, to control the subsequent routing of the movement. Clearly, there is no reason why Strickland should have "shorthauled" itself in routing the traffic by denying itself of its power to make local deliveries of shipments in New Orleans. See *Ex parte No. 230, Piggyback Service*, 322 I.C.C. 301, 342 (1964), for the sanctioning of this practice in a related context; see also *id.*, at 358-60.

(b) The Government also suggests that the interchange was unlawful because it bridged a gap in Strickland's

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including the present appellee, Gordons Transports, Inc., opposed. The Commission found no defects in the interchange, despite a flat-fee arrangement, the ownership of *all* trailers by one partner, the use of loaded trailers, the exclusive billing by Deaton, the history of Deaton's unsuccessful attempts to gain entry to Memphis, and the fact that the interchange, which was commenced only after the option was granted, was the *sole* activity of Lavendar over the route. The Commission's report was affirmed by a District Court and by this Court. See note 2, *supra*.

authority. But the basic purpose of interline and interchange between motor carriers is to permit a through movement of freight over a route which neither could serve under its separate authority. It is the Commission's stated policy: "That interchange between common carriers, in order to promote through movement of traffic without unloading, where feasible should be encouraged." *Ex parte No. MC-43,* 51 M.C.C. 461, 530 (1950). The further, related suggestion that the "service England provided was in no respect different from that which Strickland had previously sought to arrange unlawfully with the railroad" ignores the fact that the matter referred to, *Gordons Transports, Inc.* v. *Strickland Transportation Co.,* 318 I.C.C. 395 (1962), was decided under principles then applied by the Commission to "piggyback" carriage involving motor carriers and rail carriers; *Gordons* tells us nothing as to the legality of an all-motor carrier interchange.[8]

(c) The Government suggests (Motion, p. 8 n. 6) that the interchange agreement between Strickland and England violates 49 C.F.R. § 1057.5(a) in that it does not identify the vehicles, points of interchange, and the consideration. The agreement, set out at J.S. p. 53a, does in fact disclose the consideration. See paragraph 4, J.S. p. 55a. See also J.S. pp. 27-29. And this agreement, precisely as does the model Equipment Interchange Contract published for its members by the Equipment Interchange Association, employs the interchange receipt and

[8] As we pointed out in the Jurisdictional Statement (p. 7, n. 4) these principles were subsequently extensively revised. As the Government admits (Motion, p. 5, n. 5), in the *Gordons* case the Commission never passed on the *present* validity, under current rules of law, of the old "piggyback" carriage with the Illinois Central once employed by Strickland, and that decision is "not decisive as to the all-motor operations now in question." (*Ibid.*)

safety inspection report executed upon each interchange to supply the requisite detail as to vehicles and interchange points. See Equipment Interchange Association, Form EIC-1, revised July 1, 1968. If the Strickland-England agreement is unlawful for the reasons stated by the Government, the form used throughout the industry is likewise unlawful. We believe it is the Government which is in error in suggesting this new alternative basis for the Commission's action.

(d) The Government finally suggests (Motion, p. 7) that the freight volume moved by England apart from the interchange was not substantial. Its statistics are somewhat misleading.[9] In any event, the amount of other England traffic scarcely affects the legality of the interchange, whatever effect it might have on the question whether, if the interchange were found unlawful, England's rights should be found to be constructively dormant.[10]

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[9] The Government's reference is to a set of exhibits which excluded all of England's intrastate traffic and included only a portion of England's interstate traffic. An exhibit submitted by the appellants (Exhibit 40) which undertook to reflect all the interstate traffic handled by England during a six-months' period which was relevant to the rights contracted for by Strickland, indicated that approximately 25% of the traffic consisted of interstate traffic other than traffic handled in the Strickland-England interchange. Apart from the interchange movement, England operated a daily movement between New Orleans and Shreveport. (Examiner's Report, p. 21) Approximately 30% of England's 1963 revenues relevant to the operating rights contracted for by Strickland resulted from England's operations other than under the interchange arrangement. (Examiner's Report, p. 13)

[10] Certain of the private appellees attempt to reply (as the Government does not) to our argument that the basis on which the Commission's decision was rendered came as a procedural surprise to Strickland. While some of them assert (see Arkansas-Best *et al.*, Motion, p. 18) that the dispositive issues were injected in the case earlier than the Commission's Report, none of them furnishes any specific citation or quotation to show that the matters on which the Commission's Report turned actually were at issue at the time of the hearing. None of the appellees explains

2. The Government next suggests that the questions presented by the appeal with respect to the New Orleans-Shreveport rights are "basically factual." If the Commission had managed to articulate a standard of illegality in this case and the question was whether a party behaved in such a way as to violate the standard, we might agree. But here the question is: What is the standard which Strickland is supposed to have violated? Why was its conduct held unlawful, and does any of its admitted behavior constitute a violation of any provision of law, rule or regulation? As the motions to affirm by their silence indicate, the answer is none. Clearly the question of what legal standard Strickland is supposed to have violated is a question of law.[11]

Perhaps somewhat embarrassed by the lack of any specific violation on Strickland and England's part of any identifiable law, rule or regulation, the Government is moved to generalities. We are platitudinously reminded that "ostensible compliance with technical requirements does not preclude a finding of illegality." (Motion, p. 7) This may be so, but it still does not answer the question of how it was that Strickland and England are said to have acted unlawfully in their interchange.[12] As we pointed out

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why the four dissenting members of the Commission stated that the case was "being decided, at least to a great extent, upon technicalities or issues not raised by the parties." 104 M.C.C. at 327; J.S., p. 38a.

[11] Indeed, the protesting carriers made the point during the hearings that: "In the main, the factual considerations involved in these proceedings are undisputed. . . . " Joint Brief of Protestants Before Hearing Examiner, p. 16. To the same effect, see various of the Exceptions to Examiner's Report and Recommended Order, Braswell, p. 1; Arkansas-Best, p. 1; and Gordons Transports, p. 1.

[12] Another rhetorical device used by Arkansas-Best *et al.* is to assert (Motion, p. 16) that in fact "there was no interchange." As usual, we are not told why.

at length in the Jurisdictional Statement, the specifics in which the arrangements were attacked appear to consist of common practices in the interchange and leasing of motor vehicles among common carriers, most of which have been indeed affirmatively sanctioned by the Commission. Surely the technique of repeatedly calling the interchange a "device" and the repetition of the conclusion that it is unlawful does not make it so.[13] The authorities cited by the Government (Motion, pp. 7-8) do not involve arrangements similar to the interchange at bar, which we presume the Commission realized, since it did not cite them.[14] Since

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[13] In a circular argument, appellees Arkansas-Best *et al.*, say that it was not the illegality of the interchange on which the Commission's decision proceeded, but rather that Strickland and England were allegedly found unfit (Motion, pp. 13-14). However, the primary subject of the Commission's discussion of their fitness was the matter of their having run an allegedly unlawful interchange.

[14] The cases cited by the Government in its Motion—and not relied on by the Commission, we hasten to repeat—involve obvious sham operations, in which, characteristically, one carrier used its own drivers and motive power to transport shipments over the routes of the other. Thus, in *Campbell Sixty-Six Express Inc.* v. *Frisco Transportation Co.*, 81 M.C.C. 58 (1959), the lessee under an alleged lease agreement permitted the alleged lessor to use its own drivers and tractors over its routes; the lessee's involvement in the movement of traffic was never referred to on the bills of lading; and neither was equipment exchanged nor were there lease charges paid by the lessee. In *The Stewart Co., Investigation*, 87 M.C.C. 681 (1961), once again, the originating carrier's drivers and tractors were used in the entire movement; the alleged interchange partner had no equipment whatsoever; all driver compensation and fringe benefits were paid by the originating carrier; and the alleged interchange partner devoted no personnel whatsoever to the interchange. In *Tank Lines, Inc.—Purchase —S.N. Freight Line, Inc.*, 90 M.C.C. 381 (1962) one carrier used its own drivers and motive power over the routes of the other as an alleged "lessor" and solicited freight movements for which it was not originating carrier. It claimed to operate on its own routes in one direction and to be a "lessor" on the back-haul. In *Dealers Transit, Inc.—Control and Merger—William Corbitt, Inc.*, 93 M.C.C. 611 (1964), once again, the alleged lessor's drivers and tractors were used, the senior personnel of the supposed lessee

the Commission did not proceed on this theory, even if this line of cases were relevant, it would not be proper to affirm the Commission's decision on this basis.

3. In sharp distinction to the Government's approach is that of the only private appellees who have filed more than a pro forma motion, Arkansas-Best *et al.* Perhaps embarrassed by the lack of support for the conclusion of the Commission as to the illegality of the interchange, these appellees—contrary to the Government and to the obvious import of the Commission's report itself—assert that the question of the legality of the interchange "was not essential to the Commission's denial of the applications." (Arkansas-Best *et al.*, Motion, p. 14) These private appellees contend that the basic question has to do with the Commission's finding that Strickland failed to prove "public convenience and necessity" under its application. This fallacious contention is repeatedly asserted. See Arkansas-Best *et al.*, Motion, pp. 12, 14-15.

We do not contest, for the purposes of this appeal, the Commission's rejection of the contingent Section 207 application to serve between Shreveport and New Orleans filed by Strickland—under which public convenience and necessity would have to have been shown. See J.S., p. 11 and n. 7. This application was contingent upon approval of the purchase application filed under Section 5 of the Act.

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were ignorant of the details of the operation, the "lessee" had no control over the drivers or the equipment, and the lessor solicited traffic with respect to which the lessee was originating carrier. In contrast, as we pointed out in our Jurisdictional Statement (p. 34), England here did everything that a "bridge" carrier in an interchange could do; it utilized its own tractors, drivers, safety inspectors and office personnel; it maintained and operated its own tractor terminals; its employees were solely responsible to it; and its drivers transported the interchanged trailers over its own routes and using its own motive power.

As the Government admits, the basic issue in this case in its present posture is whether the Shreveport-New Orleans rights were constructively dormant on the ground that the only substantial user of them was through the unlawful interchange (Government Motion, pp. 5-6). If the rights were not dormant, as the Government indicates, there was no requirement for Strickland "to demonstrate public need." (Motion, p. 6)[15] Of course, it is well established that interchange use of rights is sufficient to demonstrate that they are not dormant and to obviate the requirement of making a fresh showing of public convenience and necessity. See the cases cited in J.S., p. 21 n. 1, and the recent case of *Aetna Freight Lines, Inc.—Control—Ray Carter*, 109 M.C.C. 13 (1969).[16]

Thus, the private appellees Arkansas-Best *et al.* simply turn matters on their heads when they claim that when the Section 207 application "fell for lack of proof, the corresponding Section 5 application fell." It was the Section 207 application which was contingent upon approval of the Section 5 application, not vice versa.[17] Our position

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[15] As the Government admits (Motion, p. 3) it is only where the proposal involves a service different from that lawfully performed by the vendor that public convenience and necessity need be shown.

[16] Indeed, in the latter case the interchange was conducted only after negotiation of the purchase contract. For other cases of the Commission taking a radically different view of what constitutes dormancy from the instant case, see, *e.g.*, *Refrigerated Foods, Inc.—Purchase—Denver-Pacific Express*, 109 M.C.C. 42 (1969); *Roadway Express, Inc.—Extension—Birmingham, Dallas, Houston*, 82 M.C.C. 689, 703 (1960).

[17] There is also a suggestion in the Arkansas-Best *et al.* Motion that under no circumstances could the Commission have approved the application because the intent of Strickland was to use the England irregular-route authorities involving New Orleans-Shreveport to perform regular-route services between New Orleans

is that the Commission erred in denying the Section 5 transfer application, which did not require a fresh showing of public convenience and necessity.

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and Shreveport, which would have been unlawful. The short answer is that the Commission did not so find; its decision is based solely upon the illegality of the interchange and it must stand or fall on that basis. These appellees also assert that under the arrangements which were first worked out administratively and now judicially pending final adjudication, under which Strickland has leased certain of England's rights, Strickland is brazenly performing unlawful regular-route movements. If this is so, it is strange that the Commission approved the arrangements and that it has taken no action with respect to Strickland. We would point out that at the hearing the charge was made that Strickland unlawfully conducted regular operations using irregular route authority (104 M.C.C., at 310, J.S., p. 21a) but the Commission did not take any action with respect to this charge. See 104 M.C.C., at 318, J.S., p. 29a. Accordingly, the Commission's decision cannot be defended on the ground that Strickland has performed, or is apt to perform, regular route transportation using irregular route authority.

As the Commission said in *Motor Common Carriers of Property—Routes and Service,* 88 M.C.C. 415, 431 (1961), "It is 'impossible to propound a general rule by which the regular—or irregular—route character of all operations may be determined, for too much depends upon the peculiar characteristics of each operation and the surrounding circumstances.'" The issue before the Commission was whether it should grant the transfer application. If once the transfer application was granted Strickland were improperly to use the transferred authority, the Commission certainly is not without its remedies. Thus, not only do Arkansas-Best *et al.* try to bottom the Commission's decision on a ground on which it did not proceed, but they seek to draw black and white lines about a matter which is not black and white and as to which, assuming Strickland is permitted to acquire England's authority, the Commission has power to prosecute any violation.

II. The Monroe-New Orleans Rights.

1. Both the Government (Motion, pp. 8-9) and Arkansas-Best *et al.* (Motion, pp. 25-26) contend that the Commission did, in fact, pass on Strickland's application as filed, and did not, as we contend in the Jurisdictional Statement (pp. 35-36) simply pass on the Examiner's unsolicited proposal that the New Orleans-Monroe rights should be transferred only if converted into regular-route authority (Strickland having never filed any application for such conversion). However, the very sentence of the Commission's report quoted by the Government (Motion, p. 9) and obviously referred to by Arkansas-Best *et al.* (Motion, pp. 25-26) is one rejecting the transfer of the New Orleans-Monroe rights upon their "*conversion* to a link in its [Strickland's] long line regular routes." (Emphasis supplied) But Strickland's proposal was for the transfer of those rights as irregular-route authority; it was the Examiner who had recommended their conversion. Thus, the fact remains that the Commission has never passed upon Strickland's application as filed, as Strickland was entitled to have it do.

2. Appellees Arkansas-Best *et al.* say that Strickland may not urge this point because it did not take exception to the Examiner's Report. It is claimed that Strickland, in effect, abandoned its original application and elected to stand on an application which it never filed—one to acquire the rights in question only if converted to regular route authority. Of course, Strickland did no such thing. It did not take exception to the Examiner's Report, since that report granted the transfer application, although converting the authority in question to regular route authority. But Strickland never consented to the Commission's fail-

ure, if it elected to reverse the Examiner's Report, to pass upon Strickland's application as originally filed. Virtually all the other parties took exception to the Examiner's conversion of the rights in question to a regular route authority between New Orleans and Monroe. Certainly Strickland was entitled to rely upon their exceptions and to assume that if the Commission agreed with them it would then pass upon its application as originally filed.

Certain of the appellees (*e.g.*, Herrin Motion, pp. 10-11) urge that it would have been impossible for the Examiner or the Commission to have granted the transfer application with respect to movements New Orleans-Monroe absent a conversion. The short answer is that neither the Examiner nor the Commission ever said so; clearly the Commission's action cannot be sustained on the theory that if it had passed on Strickland's application as filed it would have to have denied it, since the Commission did not pass on the application as filed and never indicated whether it would have granted it if it had done so.

* * * * *

The Commission, then, in this case, has held unlawful interchange operations complying in every respect with the Commission's own rules on lease and interchange of vehicles by motor carriers, and with the Commission's own prior pronouncements as to proper interchange practices; interchange operations which embodied practices which are common to the industry and in many cases necessary to an efficient interchange. The perfunctory and unsatisfactory character of the Government's attempts to justify the Commission's holding of illegality—and the unfounded assertions by the private appellees (contrary to the Government's admission) that the legality of the interchange is not central to the Commission's order—serve to underline the importance of plenary review of

the Commission's decision by this Court. Moreover, with respect to the Monroe-New Orleans rights, the record indicates a serious procedural failure on the part of the Commission, prejudicial to Strickland's rights, which the motions to affirm have not dispelled.

CONCLUSION

For the reasons stated in our Jurisdictional Statement and herein, probable jurisdiction should be noted.

Respectfully submitted,

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